them. It is further highly questionable whether the moneys purportedly paid by the purchasers to the developer without the knowledge or consent of the respondent for extras which were not however provided would in fact form part of the purchase price of the units to affect the ceiling stipulated in the Programme. The respondent has expended a very large sum of money to provide finance for the purchasers in this housing project and must necessarily have security by way of charges over the several units in question. Considering all the circumstances of this case, the rights of the parties and the balance of convenience in the matter, we are of the view that this is a case where the court is not precluded from granting the order sought although in effect the respondent would as a result secure the basic relief sought in the action.

(2) *Balance of convenience in relation to rights of third parties not before the court*

Mr. Sri Ram contends that the balance of convenience weighed against the order sought in the respondent's motion in the light of the fact that any such order would affect the rights of the developer and the purchasers who were not but should have been before the court as parties, and submits that they should have been added as parties to the proceedings under the provisions of Order 15 rule 6(2)(b) of the Rules of the High Court, 1980 which empower the court to do so either on its own motion or on application. This point was never raised or taken in the court below and no application was made by or on behalf of the appellant to this effect and we would immediately observe that this is not at all surprising since any such application, if made, would have been farcical and superfluous as it is abundantly clear that the purchasers were at all material times represented by the appellant whose interests the appellant was purporting to protect and project, and indeed the institution of these proceedings by the respondent was necessitated by the appellant's refusal to deliver the requisite documents to the respondent and cause the charges executed by the purchasers to be registered for this very reason. Even assuming the purchasers were separately represented in this matter, it is wholly inconceivable that any argument could have been put forward on their behalf which the appellant did not or could not. We cannot see how the developer is in any way concerned in this matter of the respondent's claim to entitlement to the documents of title and the registration of the charges by the purchasers in its favour.

The purchasers' dispute is not with the respondent but with the developer, and the respondent is entitled to be registered as chargee of the land in question as it has disbursed a substantial part of the end-finance approved by way of the loans granted to the purchasers, and this entitlement is in no way affected by the dispute between the purchasers and the developer in respect of the amounts for extras alleged to have been improperly collected by the latter. In so far as the respondent is concerned the liability of the purchasers for repayment under the terms of the charges would be the amounts actually disbursed by the respondent on behalf of each of them. We should perhaps mention that the respondent has in fact for the time being retained a sum of $3,750 in respect of each purchaser and notified the developer why it was doing so and the respondent has since received a notice from the developer's solicitors threatening proceedings to recover the amounts so retained. The registration of the charges will not affect the interests of the purchasers as they will not be asked to pay a larger sum than what has actually been disbursed for each of them, nor is there any question of such registration affecting the interests of the developer. As we have stressed, and we do so again, the appellant was and has been throughout representing the purchasers to vent their grievances and safeguard their interests and it is on this account that the appellant had refused to part with the documents of title or caused the charges to be registered in favour of the respondent, a stance that inevitably culminated in these proceedings by the respondent and the order on the motion now under appeal before us.

In the premises we find no substance or merit in the second ground raised on behalf of the appellant. We have in dealing with the first ground of appeal touched on the question of the balance of convenience and find this on the facts of the matter to be clearly in favour of the respondent.

We accordingly at the conclusion of argument dismissed this appeal with costs and directed the deposit lodged in court by way of security to be paid out to the respondent to account of its costs.

Appeal dismissed.

Solicitors: *Gibb & Co.; Rithauddeen & Aziz.*

MALAYSIA NATIONAL INSURANCE SDN. BHD. v. MERASLAM

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 12 & February 9, 1982]
[Kuala Lumpur — Federal Court Civil Appeal No. 36 of 1977]

Practice and Procedure — Arbitration — Application for extension of time to refer to arbitration — Whether undue hardship would be caused if extension not granted — No excuse for delay — Discretion of trial judge — Arbitration Act, 1952, s. 28.

In this case the respondent was the registered owner of a motor-cycle, which was insured against loss and damages by theft etc. with the appellant. The respondent's brother parked the motor-cycle in a private car park at Rantau Panjang on 19th June 1973 and it was stolen. A police report was lodged and the loss was also reported to the appellant. The solicitors for the appellant repudiated liability on the 9th October 1973 and on the 13th December 1973 they informed the respondent's solicitors that they had authority to accept service of process. On 10th September 1974 the respondent's solicitor asked for a copy of the complete policy and on 3rd October 1974 the appellant sent a copy of the conditions attached to the motor-cycle policies to the respondent. The insurance policy contained a condition which provided for reference to arbitration of any dispute arising between the parties. On 4th April 1975 the respondent's solicitors wrote to the appellant's solicitor asking whether the condition as to arbitration had been waived. In reply the appellant's solicitors replied that their clients were not waiving the condition. An arbitrator was subsequently appointed. The statement of claim of the respondent was filed on the 27th October 1975 and the statement of defence of the appellant on the 17th November 1975. It was one of the defences that the respondent in failing to refer his claim to arbitration within twelve calendar months from the date

of the disclaimer by the appellant had been precluded from claiming against the appellant for the alleged loss. On 13th October 1976 the respondent applied to the High Court for leave to extend time to refer his claim to arbitration pursuant to section 28 of the Arbitration Act, 1952. The learned judge made an order granting leave and the appellant appealed.

Held: (1) the court's power under section 28 of the Arbitration Act is a discretionary power to be exercised judicially primarily to determine whether there is undue hardship to the claimants and whether there is excessive or greater hardship than the circumstances warrant. Any mistake by the claimant, if any, must be excusable provided however there is no prejudice to the other side;

(2) in this case no reasonable explanation was advanced by the respondent sufficient to excuse his delay to take steps to have his claim referred to arbitration. The circumstances of the case do not warrant a finding that there was undue or excessive hardship. Indeed there was no excuse whatever for the respondent to have delayed making reference to arbitration;

(3) while the appeal court is quite slow to interfere with the exercise of a discretionary power by a judge, this was a case where that discretion was not exercised judicially and therefore the order of the learned judge must be set aside.

Cases referred to:-

(1) *Liberian Shipping Corporation "Pegasus"* v. *A. King & Sons Ltd.* [1967] 2 Q.B. 86.

(2) *Alma Shipping Corporation* v. *Union of India & Anor., The Astraea* [1971] 2 Lloyd's Rep. 494.

(3) *E.B. Aaby's Rederi A/S* v. *Union of India, the Evje* [1972] 2 Lloyd's Rep. 129.

(4) *Agro Company of Canada Ltd.* v. *Richmond Shipping Ltd. the Simonburn* [1972] 2 Lloyd's Rep. 355.

(5) *Intermare Transport G.m.b.H.* v. *Naves Transoceanicas Armadora S.A., the Aristokratis,* [1976] 1 Lloyd's Rep. 552.

(6) *Atlantic Shipping Co. S.A.* v. *Tradax Internacional S.A., the Bratislava* [1977] 2 Lloyd's Rep. 269.

(7) *Moscow v/o Exportkhleb* v. *Helmville Ltd., The Jocelyne* [1977] 2 Lloyd's Rep. 121.

FEDERAL COURT.

Raja Abdul Aziz Addruse for the appellant.

V. Krishnan for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The appeal is against the decision of Harun J. granting leave to extend the time to refer the respondent's claim to arbitration pursuant to section 28 of the Arbitration Act, 1952.

The respondent is the registered owner of motor-cycle No. BU 3998 and the appellants are the insurers of this motor-cycle against loss and damages by theft etc. to a limit of $12,000.

On or about June 19, 1973 during the currency of the policy of insurance the respondent's brother parked the motor-cycle in a private car park at Rantau Panjang Kelantan and it was stolen. A police report was lodged on June 21, 1973 at Rantau Panjang. On June 25, 1973, the respondent reported the loss to the appellant.

The solicitors for the appellant by letter dated October 9, 1973 repudiated liability on the ground that reasonable steps were not taken to safeguard the said motor-cycle and there was a delay in reporting the theft to the police.

On December 13, 1973, the appellant's solicitors advised the then respondent's solicitors that they had authority to accept service of process should legal proceedings be instituted and another letter to the same effect was sent on November 18, 1974 preceding the letter sent by the respondent's solicitors on September 10, 1974 asking for the appellant to forward a copy of the complete policy. On October 3, 1974, the appellant forwarded a copy of the conditions attached to the motor-cycle policies.

In the affidavit affirmed by the respondent in support of the application for leave to extend the time, reference was made to condition 8 of the policy of insurance which provides for reference to arbitration of any dispute which shall arise between the parties.

On April 14, 1975, the respondent's solicitors wrote to the appellant's solicitors and for convenience we reproduce its full text as follows —

"Re: *Loss of Vehicle No. BU 3998*

"We refer to the above subject matter and to your letter dated April 8, 1975 enclosing a copy of the complete policy.

2. Upon perusal of the policy we observe at clause 8 of the condition that there is a requirement for this matter to be referred to Arbitration.

3. We presume that since you have stated in your previous letters that you have instructions to accept service that your clients are waiving Arbitration.

4. Kindly confirm same as we intend filing proceedings forthwith.

5. Kindly also note that the financiers of the motor-cycle No. BU 3998 have filed proceedings against our client claiming all the arrears of instalments which our client has not paid in view of the fact that your clients has not re-imbursed our client under the Insurance Policy."

On May 7, 1975, the appellant's solicitors replied stating —

"We refer to your letter of 14th April, 1975.

2. As to paragraphs 2, 3 and 4 of your said letter, our clients are not waiving the conditions as to arbitration. Kindly nominate an arbitrator for our clients' consideration if you are so instructed."

Raja Abdul Aziz counsel for the appellant submits that the question before the court is one of construction of section 28 of the Arbitration Act, 1952 as to the power of a High Court to extend time for commencing arbitration proceedings.

It is not in dispute that the appellant repudiated liability on October 9, 1973 followed by a letter of December 13, 1973. The respondent was also advised that the appellant was ready to accept service of process. Another letter to the same effect was sent on November 18, 1974. It is also not in dispute that when the respondent asked for a complete copy of the policy a year had passed.

On October 18, 1975 by consent, Mr. Khoo Eng Chin was appointed to act as sole arbitrator. There was an order for the respondent to deliver his statement of claim within three weeks from the date thereof and the appellant to deliver statement of defence within three weeks from the date of delivery of the statement of claim. The respondent filed his statement of claim on October 27, 1975. The statement of defence was filed on November 17, 1975. It is one of the defences that the respondent in failing to refer his claim to arbitration within 12 calendar months from the date

of the disclaimer by the appellant has been precluded from claiming against the appellant for the alleged loss.

On October 13, 1976, the respondent applied by way of originating summons for leave to extend time to refer his claim to arbitration pursuant to section 28 of the Arbitration Act, 1952. The learned judge made an order granting leave. Hence the appeal.

The affidavit affirmed by the respondent in support of the application contends that by agreeing to have the claim arbitrated the appellant has waived its rights and is therefore estopped from alleging that he is precluded from making a claim and that the claim is time-barred. The respondent points out that since his proposal for the appointment of an arbitrator was made twelve months after the letter of repudiation the appellant should have refused to have the matter arbitrated instead of agreeing to it.

We shall now set out section 28 of the Arbitration Act, 1952 and condition 8 of the policy of insurance —

"28. Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.

8. All differences arising out of this policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of Action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

Condition 8 permits *all differences* (the emphasis is ours) to be referred for decision by arbitration and it also provides and in our view makes it reasonably plain that a claim shall not be recoverable if it is not referred to arbitration within twelve months after a disclaimer. In this case the appellant disclaimed liability as early as October 9, 1973 but the request for reference to an arbitrator was not made until April 14, 1975 eighteen months and a few days after the disclaimer. While it is true that the time limit for reference to arbitration may be extended by the court, it should only be done if it is satisfied that in the circumstances of the case undue hardship would otherwise be caused.

Before we consider the merits of the appeal, we would deal first with the respondent's contention that the appellant is estopped from contending that the claim is time-barred.

In this respect it is the appellant's contention that what was waived was only the reference to arbitration but not the condition and it is therefore open to the appellant to disclaim liability on the ground advanced in the disclaimer as well as on the ground that the claim is time-barred and therefore irrecoverable.

On this point we feel bound to conclude that there is very little substance in the respondent's argument. Our view finds support in and is reinforced by condition 8 itself which clearly permits all differences or disputes arising out of the policy to be referred for decision of an arbitrator. The appellant made this abundantly clear to the respondent. Indeed the respondent knew that the appellant disputed there was waiver of the condition as to arbitration in its letter of May 7, 1975. It may well be the appellant ought to have refused to the appointment of an arbitrator but the failure to do so should not be held against the appellant and we do not think the appellant ought to be precluded from raising at any time the defence that was available.

The crucial issue for our consideration is whether in the circumstances of this particular case it was proper for the learned judge to grant leave to extend the time for reference to an arbitration.

It is clear that the granting of an extension of time not only enables the respondent to have the claim arbitrated, but also nullifies the appellant's defence that the claim is time-barred.

It is the appellant's contention that primarily it was for the judge to consider whether undue hardship would otherwise be caused to the respondent in the particular circumstances of this case.

Raja Abdul Aziz has drawn our attention to the case of *Liberian Shipping Corporation "Pegasus" v. A. King & Sons Ltd.*[1] where section 27 of the English Arbitration Act, 1950 which section is *in pari materia* with section 28 of the Arbitration Act, 1952, in which case there was a delay of a few days and at page 98 Lord Denning M.R. construed the meaning of "undue hardship" and in doing so had this to say —

"It does appear that in the past the courts have been inclined to use this argument: The words used in the statute are 'undue hardship'. A 'hardship' by itself is something severe which is hard to endure. It is always a 'hardship' to be barred by a time-limit. If a man does not read the contract and is a day or two late, it is a 'hardship,' but it is not an 'undue hardship': because it is his own fault.

I cannot accept this narrow interpretation of the statute. These time-limit clauses used to operate most unjustly. Claimants used to find their claims barred when, by some oversight, they were only a day or two late. In order to avoid that injustice, the legislature intervened so as to enable the courts to extend the time whenever 'in the circumstances of the case undue hardship would otherwise be caused.' 'Undue' there simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault.

Applying this test, it seems to me that if a claimant makes a mistake which is excusable, and is in consequence a few days out of time, then if there is no prejudice to the other side, it would be altogether too harsh to deprive him of all chance for ever of coming and making his claim. All the more so if the mistake is contributed to or shared by the other side."

In the same case Harman L.J. disagreed with that

part of Lord Denning's judgment when he said that the mistake was "contributed to or shared by" for reason that, in his view, the Master of the Rolls has construed these words as if they were "hardship" whereas they were in fact "undue hardship" which is something very different.

It is the judgment of Harman L.J. that "in matters of this sort, which are questions of construction depending on the exact circumstances of the case, as the section shows, one case is not binding on another, for there always is some difference between one case and another."

The *"Pegasus"* was applied in *Alma Shipping Corporation* v. *Union of India & Anor., The Astraea*[2] where there was a delay of a few months and time was not extended as the plaintiffs had suffered no undue hardship. Roskill J. refused to exercise the discretion in favour of extending the time for he was not satisfied that his refusal to exercise the power under section 27 of the Arbitration Act, 1950 would cause the plaintiffs any undue hardship. In *E.B. Aaby's Rederi A/S* v. *Union of India, The Evje*[3] there was a delay of 2½ years and extension was refused. Applying the principle laid down in the *"Pegasus"* as guidance that there should be greater hardship than the circumstances warrant, Mocatta J. at page 138 said —

"There is, to my mind, no satisfactory explanation of this long lapse of time and, if the issue as to due diligence is now to be fought out, I cannot exclude the possibility that the staleness of the issue will prejudice the defendants' case. This, as appears from what Lord Justice Salmon said, is a material consideration and, in my judgment, tips the scales against the plaintiffs. I would, therefore, had I to decide whether to grant an extension of time, have refused the relief sought."

Raja Abdul Aziz has also cited the case of *Agro Company of Canada Ltd.* v. *Richmond Shipping Ltd., The Simonburn*[4] where there was a delay of four months and time was not extended. The *"Pegasus"* was applied and Lord Denning M.R. at page 394 stressed that section 27 of the Arbitration Act, 1950 is to be construed liberally.

In the case of *Intermare Transport G.m.b.H.* v. *Naves Transoceanicas Armadora S.A., The Aristokratis*[5] there was a delay of two months and extension was given having regard to exceptional circumstances of that particular case and there Mocatta J. at page 557 had this to say —

"The important points bearing upon the exercise of my discretion in this matter are that the construction point was not free of difficulty and was a novel matter in relation to a time charter, that the owners' arbitrator's appointment was under two months out of time, that the facts in relation to the Chungjin damages appear to have been fully investigated on behalf of the charterers and that an appropriate extension of time would not prejudice them. Bearing these matters in mind and having regard to what was said in the *Pegasus* I have come to the conclusion that this is a case in which I should exercise the powers given the court under section 27 of the Arbitration Act, 1950, and I extend the time within which the owners were entitled to appoint their arbitrator in respect of the Chungjin damages to July 31, 1974."

In *Atlantic Shipping Co. S.A.* v. *Tradax Internacional S.A., The Bratislava*[6] extension was granted where there was a month's delay on the ground that a refusal of extension of time would be a case of undue hardship and that the other party would not be liable to suffer any substantial prejudice since they would also be granted a corresponding extension of time for their claim against another party. In the case of *Moscow v/o Exportkhleb* v. *Helmville Ltd., The Jocelyne*[7] Brandon J. considered the court's power to extend time for the appointment of an arbitrator and summarised at page 129 the guidelines laid down in the majority judgments in the *"Pegasus"* and went on to discuss at great length the question of prejudice. He said that in considering whether the defendants had been prejudiced by the plaintiffs' delay in appointing an arbitrator comparison was to be made between the situation of the defendants as it would have been if the plaintiffs had appointed the arbitrator by the date of expiry of the agreed extension of time for commencing proceedings and the situation of the defendants as it would now be if the court were to grant the plaintiffs' application and extend the time for appointing an arbitrator.

In the last paragraph 1st column at page 132 he stated that —

"Any substantial delay in the hearing of proceedings relating to a civil dispute is *prima facie* objectionable on the ground that it tends, in most cases at any rate, to make it more difficult for such proceedings to be determined justly. It does not, however, follow from this that, whenever such delay occurs, it will necessarily cause prejudice to the defendants to the claim. There may be cases in which the only, or substantially the only, questions to be decided are questions of law. This may be because either the material facts are agreed, or they are only marginally in dispute or they can be established satisfactorily from contemporaneous or nearly contemporaneous documentary evidence. There may be other cases in which, because the burden of proving all or most of the material facts is on the plaintiffs, the delay which has occurred is more prejudicial to them than to the defendants, who may even benefit indirectly from it. It follows that, in deciding whether delay in any particular case has been prejudicial to the defendants, it is necessary to consider what are the various issues to be tried, on which party the burden of proof in relation to them lies, and the nature of the evidence which the defendants will or may need to adduce in relation to them."

Now, in our judgment, the question of prejudice is a factor for the court to take into consideration in exercising the power to extend the time, a circumstance to be viewed in the light of all the circumstances of the case. No rigid test can be laid down for the ultimate decision would principally depend upon a finding by the court whether in the circumstances of the case undue hardship would otherwise be caused to the claimants. In this regard we are inclined to prefer the guidelines laid down by Lord Denning M.R. in the *"Pegasus"* as further elaborated by Salmon L.J. at page 107/8 when he said —

"In considering this question the court must take all the relevant circumstances of the case into account, the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time, the amount at stake, the length of the delay, whether the claimants have been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances I have mentioned, which do not arise here, it is obvious that normally the power would be exercised. But those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time. I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay. Of course, if there is a possibility, it might be said that it is no undue hardship upon the claimants to refuse an exten-

sion of time because, if the hardship is lifted from their shoulders, some hardship will fall on the shoulders of the respondents and, after all, the delay is the claimants' fault."

Applying the test laid down in the *"Pegasus"* we form the view that the court's power under section 28 of our Act is a discretionary power to be exercised judicially primarily to determine whether there is undue hardship to the claimants and to quote the words used by Lord Denning M.R. in the *"Pegasus"* whether there is excessive or "greater hardship than the circumstances warrant and any mistake by the claimant, if any, must be excusable provided, however, there is no prejudice to the other side." We should stress that each case must be decided in the light of the particular circumstances of that case.

In the case before us there is clearly revealed that the appellant made it abundantly clear that it was disputing liability and was prepared to accept service of process should legal proceedings be instituted. By October 9, 1973, there had already arisen a difference or dispute under the policy to warrant a reference to the decision of an arbitrator, and it was up to the respondent to take steps to effect the appointment of an arbitrator and to do so within the time limited under the agreement. The respondent's solicitors were evidently fully aware of condition 8 as is revealed from the letter of April 14, 1975, at which time a complete policy was already in the respondent's possession. It was quite clear to the respondent that there was no question whatsoever of the appellant admitting liability especially so when the appellant's solicitors had earlier firmly advised the respondent's solicitors that they had authority to accept service of process in reply to the respondent's enquiry whether the appellant was prepared to settle the matter as shown in the respondent's letter of October 8, 1974. The respondent's solicitors were also fully aware that as at May 7, 1975 the appellant was not waiving the condition as to arbitration even though the appellant was not objecting to the appointment of an arbitrator. It is further revealed that the appellant also raised as one of the defences in the statement of defence that the claim is time-barred under condition 8. It was subsequent to this that the respondent made an application for extension of time but such application was not filed until October 13, 1976 almost one whole year after the delivery of the statement of defence.

As for the allegation that the appellant was estopped from denying the claim for the reason that they had agreed to have his claim arbitrated and there was therefore a waiver of a right to rely on twelve months' limit the only averment by the respondent in his affidavit in support of his allegation that undue hardship would be caused to him was that there was a claim against him by a finance company who are the legal owners of the motor-cycle. We do not for a moment doubt that it is a hardship to the respondent when he has to face such a claim just as it would be to anyone who has lost a motor-vehicle bought on hire-purchase but such a consequence, though a hardship, is something which a borrower shall have to answer to a lender or financier and it would not, in our judgment, constitute by itself an unwarranted hardship such that it can be said to be excessive to justify an extension of time to pursue his claim under the policy.

No reasonable explanation was advanced by the respondent in his affidavit sufficient to excuse his delay to take steps to have his claim referred to arbitration. It is also pertinent to note that there is also no explanation why the application for extension of time was not made at the earliest possible opportunity after the appellant had delivered the statement of defence; why did the respondent have to wait a year after that before asking for such extension.

The exact circumstances of this case do not, in our view, warrant a finding that there was undue or excessive hardship. Indeed there was no excuse whatever for the respondent to have delayed making reference to arbitration.

What also emerges from the circumstances of this case is that we are unable to see any fault, on the part of the appellant; instead the blame lay almost entirely with the respondent. And what further emerges is that this is not a case where it can be said that the consequences are out of proportion to the degree of blameworthiness that may be attached to the respondent.

On the question of possible prejudice to the appellant by the respondent's delay, it is difficult to determine to some degree of certainty. In this respect we wish to say quite candidly that strictly it is open to argument that it may not so prejudice as conceivably it would be more beneficial to an insurance company to delay payment rather than to pay promptly if any payment has to be made. That however is not the approach our courts should take let alone to regard this as a test to determine whether a defendant is prejudiced by delay on the part of a claimant. Such an approach does not seem consistent with the spirit of the law. What seems to be a relevant factor to bear in mind is the likelihood of some difficulty which may confront the defendant by reason of the delay to secure evidence to prove any allegation in defence of the claim. Applying this to the present case, it may well be the appellant has to show recklessness on the part of the respondent to have left the vehicle overnight at Rantau Panjang beside a river where there exists a notorious fact that motor-cars are to a high degree liable to be stolen and taken across to Thailand.

In consideration of the above, we would say that while this court is quite slow to interfere with the exercise of a discretionary power by a judge we however form the view that this is one case where that discretion was not exercised judicially and for this reason we allow the appeal with costs and set aside the order of the learned judge and substitute therefor an order that the application be dismissed.

Order accordingly.

Solicitors: *Rithauddeen & Aziz; Mah-Kok & Din.*